OPINIONS BELOW

The opinion of the majority of the hearing panel is not yet reported but appears at page 1a of the Appendix to this petition; the dissenting opinion of Judge Anderson appears at page 13a of the Appendix.

The majority opinion handed down after reconsideration of the case by the court en banc is not yet reported, but appears at page 41a of the Appendix hereto; the dissenting opinion filed at the same time appears at page 48a of the Appendix hereto.

JURISDICTION

The original opinion and judgment of the Court of Appeals for the Second Circuit, and a dissenting opinion, were handed down on December 12, 1968. Timely petitions for rehearing were filed, and the Court of Appeals entered an Order granting reconsideration by the court en banc on the original briefs and supplemental briefs, but without reargument (App. 40a). The opinion and decision of the court en banc, and a dissenting opinion, were filed on April 2, 1969; and this petition for certiorari was filed within 90 days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether, consistent with the due process clause of the Fourteenth Amendment, an individual not residing in New York, having no personal contacts with that State, and who purchases and receives an automobile liability insurance policy outside New York, can be subjected to a suit in New York based on an accident that happened outside New York, solely because the nonresident's insurer has an office in New York and the plaintiff is a resident of New York?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws." (Emphasis added)

Sections 5201 (a) and 6202 of the New York Civil Practice Laws and Rules provide as follows:

> "(a) Debt against which a money judgment may be enforced. A money judgment may be enforced against any debt, which is past due or which is yet to become due, certainly or upon demand of the judgment debtor, whether it was incurred within or without the state, to or from a resident or non-resident, unless it is exempt from application to the satisfaction of the judgment. A debt may consist of a cause of action which could be assigned or transferred accruing within or without the state." (5201, subd. [a])
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> * * * * *
>
> "Debt or property subject to attachment; proper garnishee. Any debt or property against which a money judgment may be enforced as provided in section 5201 is subject to attachment. The proper garnishee of any such property or debt is the person designated in section 5201; for the purpose of applying

the provisions to attachment, references to a 'judgment debtor' in section 5201 and in subdivision (h) of section 105 shall be construed to mean 'defendant.' (6202)."

Section 320 of the New York Civil Procedure Laws and Rules provides in pertinent part as follows:

> "(c) *When appearance confers personal jurisdiction, in certain actions.*
>
> "In a case where the court's jurisdiction is not based upon personal service on the defendant, an appearance is not the equivalent to personal service of the summons upon the defendant if an objection to jurisdiction under paragraphs eight or nine of subdivision (a) of rule 3211, or both, is asserted at the time of appearance by motion or in the answer, *unless the defendant proceeds with the defense after asserting the objection to jurisdiction and the objection is not ultimately sustained.*" (Emphasis added.)

STATEMENT OF THE CASE

Petitioners were the defendants below, and for the sake of clarity will be so designated in this petition; the respondents will be referred to as plaintiffs.

The constitutional issue presented by this case arose in New York state court actions each of which was, on motion of the defendants, removed to the appropriate federal district court pursuant to the diversity statute, 28 U.S.C. §1332 and the removal statute, 28 U.S.C. §1441.

The respective defendants then moved to dismiss for lack of jurisdiction under the due process clause of the Fourteenth Amendment and, in each case, that motion was denied.

Acting pursuant to 28 U.S.C. §1292 (b), each district court thereafter certified that its decision involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal might materially advance the ultimate termination of the litigation. The Court of Appeals for the Second Circuit granted each defendant's motion for leave to appeal.

The case of *Rosenberg v. Minichiello* was argued to the Court of Appeals on October 9, 1968. Thereafter, at the direction of the Court of Appeals, the case of *Stevens v. Tyng* was submitted to that court on briefs.

The original decision of the Court of Appeals dated December 12, 1968 affirmed the decisions of the district court in each case. The majority opinion of Judge Friendly was joined by Judge Feinberg; Judge Anderson filed a dissenting opinion.

Timely petitions for rehearing before the Court *en banc* were filed by defendants and granted by the Court of Appeals. The Court then reconsidered the cases on the basis of both prior and supplemental briefs, but without additional oral argument.

The final decision of the Court of Appeals dated April 2, 1969 again affirmed the district court's decision in each

case. The majority opinion of Judge Friendly was joined by Judges Waterman, Smith, Kaufman, Hays and Feinberg (App. 41a). The dissenting opinion of Judge Anderson was joined by Chief Judge Lumbard and Judge Moore (App. 48a).

The question which so divided the Court of Appeals involves basic considerations of due process of law under our Federal system. From the very beginning the petitioners here, as defendants below, grounded their challenge to jurisdiction on the due process clause of the Fourteenth Amendment and asserted that a contrary decision would fly in the face of decisions of this Court interpreting and applying that Amendment. The basis for defendants' challenge to the jurisdiction becomes apparent upon a mere recitation of the basic facts in each case:

(1) Defendant Rosenberg, a resident of Pennsylvania, had bought and received in that State an automobile liability insurance policy. On January 9, 1965, driving on a highway near Harrisburg, Pennsylvania, plaintiff Minichiello, a resident of New York, collided with Rosenberg. In January of 1968, Minichiello's executrix sued Rosenberg in the New York state courts and had a writ of attachment served on an office maintained in New York by Rosenberg's insurer. Rosenberg was not served. Solely on the basis of the purported attachment of the insurer's obligation to defend and to indemnify Rosenberg, and plaintiff's residence in New York, the district court and the Court of Appeals have now upheld New York's jurisdiction over defendant Rosenberg, although the accident happened in Pennsylvania, the policy was issued in Pennsylvania, and Rosenberg admittedly has had no personal contacts of any kind with New York.

(2) Similarly, defendants Tyng were held subject to suit in New York although both father and son are residents of Massachusetts, the insurance policy was purchased and delivered in Massachussetts, and the accident with

plaintiff Stevens happened in Massachusetts. Neither of the Tyngs had any personal contacts with New York and neither was served. Nevertheless, the Court of Appeals held that service of a writ of attachment on an office of the Tyngs' insurer in New York was sufficient to subject them to suit in that State by a resident of that State.

In the Court of Appeals, the defendants emphasized the following reasons why they could not constitutionally be subjected to suit in New York on these causes of action:

(1) The fact that the non-resident defendants' respective liability insurers had offices in New York did not give that state jurisdiction over any "property" in the state to support even a quasi-in-rem jurisdiction over the defendants.[1] The insured's right to require and the insurer's duty

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[1] This type of proceedings has been labelled a "Seider attachment" because it was first upheld by the New York Court of Appeals in *Seider v. Roth*, 17 N.Y. 2d 111. In that case, Judge Burke, speaking in dissent for himself and two other judges, cogently described the "debt" as follows (17 N.Y. 2d 115):

> The so-called "debt" which is supposed to be subject to attachment is a mere promise made to the nonresident insured by the foreign insurance carrier to *defend and indemnify* the Canadian resident *if a suit is commenced* and *if damages are awarded* against the insured. Such a promise is contingent in nature. It is exactly this type of contingent undertaking which does not fall within the definition of attachable debt contained in CPLR 5201 (subd.[a]), i.e., one which "is past due or which is yet to become due, certainly or upon demand of the judgment debtor". The bare undertaking to defend and indemnify is not an obligation "past due" and it is not certain to become due until jurisdiction over the insured is *properly* obtained. In New York "It is well settled that an indebtedness is not attachable unless it is absolutely payable at present or in the future, and not dependable upon *any* contingency." (Herrmann & Grace v. City of New York, 130 App. Div. 531, 535, affd. on opn. of Appellate Division 199 N. Y. 600; italics supplied.)
>
> Faced with this long-established rule the plaintiffs indulge in circular ratiocination. The jurisdiction, they assert, is based upon a promise which evidently does not mature until there is jurisdiction. The existence of the policy is used as a sufficient

basis for jurisdiction to start the very action necessary to activate the insurer's obligation under the policy. In other words, the promise to defend the insured is assumed to furnish the jurisdiction for a civil suit which must be validly commenced before the obligation to defend can possibly accrue. "This is a bootstrap situation." (Professor D. D. Siegel, Supplementary Commentary to CPLR 5201, McKinney's Cons. Laws of N. Y., Book 7B, 1965 Pamphlet, pp. 10-13.)

* * * * *

Not only does the text of CPLR and the contingent nature of an automobile liability policy dictate a vacatur of the warrant of attachment but, where the grounds to obtain jurisdiction are tenuous, public policy should restrain us from approving, under the guise of "in rem" jurisdiction over a nonresident motorist, "a direct action" against a foreign insurer licensed to do business in this State on a policy issued in Montreal to a resident of Quebec, Canada, for damages resulting from a Vermont accident. (17 N.Y. 2d 117).

In *Simpson v. Loehman*, 21 N.Y. 2d 305, the New York Court of Appeals also upheld the Seider attachment over federal constitutional objections. Speaking for himself and Judge Scileppi in dissent on that occasion, Judge Burke said:

Seider may be upheld only if we may constitutionally provide for our residents (and for all who would later come into our courts, Seider would seem to allow) an umbrella of protection, including venue at the plaintiff's convenience and without any regard for the convenience of defendants or the availability of witnesses, unlimited in its extent,[4] only if we may say to such persons that no matter which State or nation they travel to they carry with them the right to bring back to the New York courts for adjudication controversies otherwise completely local in character. I do not read Watson as allowing this and, in fact, Home Ins. Co. v. Dick (281 U. S. 397) may be read as barring such an extension of the regulatory power of this State beyond its territorial limits. In Dick, the Supreme Court, in language particularly apt for the Seider situation, pointed out that residence was not enough to create such jurisdiction. It there remarked: "The fact that Dick's permanent residence was in Texas is without significance. At all times here material, he was physically present and acting in Mexico" (supra, p. 408;

4. For example, in Victor v. Lyon Assoc. (21 N. Y. 2d 695) plaintiff was injured in Danang, South Vietnam. Defendant is a Maryland corporation doing business in the Far East and the policy was issued in Okinawa. Coverage was limited to certain areas in the Far East.

mphasis added; cf. Clay v. Sun Ins. Office, Ltd., 377 U. S. 179, 182). Likewise, at all times that I would consider material, to wit, when the accidents occurred, Seider and the plaintiffs in the cases now before this court, Simpson and Victor, were "physically present and acting" outside this State. (21 N.Y. 2d 319-320.)

Watson is in many ways analogous to developments that have taken place in the extension of State court jurisdiction under the various State "long-arm" statutes. In fact, many would urge that on the facts of that case Louisiana might have constitutionally exercised in personam jurisdiction over the out-of-State manufacturer (compare Gray v. American Radiator & Std. Sanitary Corp., 22 Ill. 2d 432; compare, also, Feathers v. McLucas, 15 N. Y. 2d 443, 458-464, with the subsequent amendment to CPLR 302 added by L. 1966, ch. 590). Under the facts of Seider and the cases now before us I know of no authority that would support in personam jurisdiction in the courts of this State over the out-of-State defendant-insured.

The very same considerations lead me to doubt that jurisdiction in rem based upon the obligations of an insurer under a contract of insurance can constitutionally be exercised by this State in the Seider situation. Assuming even the continued utility and constitutional viability of the rule of Harris v. Balk (198 U. S. 215) that a debt has its situs and may be attached in any State in which the debtor is subject to in personam jurisdiction, it is clear that the obligations of an insurer under a liability policy to defend and indemnify the insured are not "ordinary debts," such as the Supreme Court was considering in Harris v. Balk (see 198 U. S., p. 223). They are contingent contractual obligations, requiring the commencement of suit against the insured (and the obtaining of a judgment with respect to the obligation to indemnify) before the insured has any claim against the ostensible "debtor" insurer. The defendant-insured has no property within the State, which is the necessary predicate for an exercise of in rem jurisdiction (Hanson v. Denckla, 357 U. S. 235, 246), unless New York may properly (i.e., constitutionally) transform these contingent obligations into matured debts owing to the insured. This it cannot do absent a sufficient State interest in the insurance relationship or the accident. In my dissent in Seider I referred to the result obtained there as jurisdiction acquired through a "bootstrap operation" (17 N. Y. 2d 111, 115, quoting Professor Siegel). This sort of bootstrap operation, I respectfully submit, is constitutionally impermissible under the circumstances pre-

sented in Seider and the cases now before this court (21 N.Y. 2d 318-320).

In the same case, Judge Breitel concurred "only on constraint of *Seider v. Roth*" and said, for himself and Judge Bergan:

> It is the most tenuous of nominalist thinking that accords the status of an asset, leviable and attachable, to a contingent liability to defend and indemnify under a public liability insurance policy.
>
> The applicable statutes are CPLR 5201 (subd. [a]) and 6202. They read as follows:
>
> "'(a) Debt against which a money judgment may be enforced. A money judgment may be enforced against any debt, which is past due or which is yet to become due, certainly or upon demand of the judgment debtor, whether it was incurred within or without the state, to or from a resident or non-resident, unless it is exempt from application to the satisfaction of the judgment. A debt may consist of a cause of action which could be assigned or transferred accruing within or without the state." (5201, subd. [a])
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> and
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> "Debt or property subject to attachment; proper garnishee. Any debt or property against which a money judgment may be enforced as provided in section 5201 is subject to attachment. The proper garnishee of any such property or debt is the person designated in section 5201; for the purpose of applying the provisions to attachment, references to a 'judgment debtor' in section 5201 and in subdivision (h) of section 105 shall be construed to mean 'defendant'" (6202).
>
> True, these contemporary statutes are designed to reach every kind of marketable and assignable property, and every kind of right that is reducible to marketable or assignable economic value. They refer to debts and property, and in the case of causes of action they must be assignable. But they are not intended or designed to reach every obligation created by contract, however inchoate, conditional, contingent, or personal. The obligation to defend and, even more, the obligation to indemnify are just such inchoate, conditional, contingent, and personal obligations. Before they come into play, there must be an external event (usually an accident) within the coverage of the policy, performance of conditions precedent by the insured, and co-operation by the insured. Even then, if the insurer's obligation to defend is fully performed, there is noth-

to furnish a defense and indemnification, is not a right or "debt" that can be assigned, sold, pledged, devised, or otherwise disposed of by the inursed. It does not entitle the insured to any money, security or property of any kind. Nor can such rights or "debts" be seized, appraised and sold by any sheriff or marshal. And, under the policy, neither obligation arises until *in personam* jurisdiction over the insured has been made effective. Since *in personam* jurisdiction admittedly was not obtained over these non-residents in New York and since no attachable property of either was reached by the "attachment" served on their insurers, there

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ing of economic value to which the insured may make claim, receive, or assign. As to the obligation to indemnify, that does not ripen until accident, defense, and defeat resulting in judgment against the insured.

The statutes, in making intangible assets leviable and attachable, are not intended to reach the intangible right as such but instead to reach the tangibles that eventually must result from the intangible right. Thus, at the very least, before any intangible right has practical significance as an asset to be levied upon or attached, it must give promise of being translatable into an economically valuable tangible, usually cash. The instances are easiest for application of the statutes when, unlike here, the intangible right is marketable or assignable. Hence, the inappropriateness of precedents based upon life insurance policies (matured or unmatured), upon property or fidelity loss policies after loss, and the like. In each of such instances the insured's right to tangible funds has attained a cognizable probability of being translated into funds.

So much for the analysis of the rights involved, no merely theoretical matter, but one which goes to the usefulness of the legal concepts employed, which must have some root in reality. As for the effect of the rule, the practical consequences are highly undesirable. This State, and particularly its chief city, is the mecca for those seeking high verdicts in personal injury cases (see, e.g., Gilchrist v. Trans-Canada Air Lines, 27 A D 2d 524). On the basis of the rule in the Seider case, it will be the rare plaintiff who cannot invoke the jurisdiction of New York courts, even though only quasi in rem, since it will be a very small insurance company that does not have a palpable contact with this State. (21 N. Y. 2d 314-316).

is no basis on which jurisdiction could attach under the standards established by decisions of this Court such as *Cooper v. Reynolds Lessee*, 77 U. S. (10 Wall.) 308; *Black v. Zacharie & Co.*, 44 U. S. (3 How.) 483; *Pennoyer v. Neff*, 95 U. S. 714; *McDonald v. MaBee*, 243 U. S. 90; *Hanson v. Denckla*, 357 U. S. 235.

(2) The facts that the plaintiffs are residents of the forum state, and defendants' insurers have offices there, do not support jurisdiction over these causes of action which arose outside New York and involve defendants admittedly having no personal contacts with New York. Any such assertion of jurisdiction is forbidden by decisions of this Court such as those cited in the immediately preceding subparagraph, as well as *Home Ins. Co. v. Dick*, 281 U.S. 397; *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U. S. 143; *International Shoe Co. v. Washington*, 326 U. S. 310; *Texas v. New Jersey*, 379 U. S. 674.

(3) A decision upholding New York's jurisdiction would force defendants to choose between (a) their constitutional right to a hearing before a court having jurisdiction and (b) their insurance coverage, since the New York Court of Appeals had already held in *Simpson v. Loehmann*, 21 N. Y. 2d 305, that the insurer could disclaim if the insured defendant did not appear for trial in New York. Such a choice, chilling the assertion of the right to due process of law, cannot constitutionally be imposed upon anyone: *U. S. v. Jackson*, 390 U. S. 570; *U. S. v. Robel*, 389 U. S. 508. Moreover, despite the New York Court of Appeals' legislative holding[2] that there could be no *recovery* in

[2] The legislature of New York never amended CPCR §320 to permit a genuine limited appearance in these *Seider* cases. See Stein, Jurisdiction by Attachment of Liability Insurance, 43 *N.Y.U. L. Rev.* 1075, notes 58-62, and 198-199. The New York Court of Appeals, in *Simpson v. Loehmann*, 21 N.Y. 2d 990, purported to create such a provision in an attempt to save the *Seider* attachment procedure from federal constitutional objections. Ibid. The Court of Appeals for the Second Circuit did not of course question the validity of this judicial "miracle" (App. 8a, 9a).

New York in excess of the face of the policy even if the nonresident insured defendant did appear and defend in New York, the defendant could be subjected to suit in other states for the excess of that judgment over the face of the policy, all of which would have been appropriated to satisfy the improper New York judgment.[3]

4. Even if the Court of Appeals considered its only duty to be application of traditional standards of "fair play" or an appropriate "balancing of interests", the attempt to force defendants to come to New York to litigate must be rejected. Otherwise, any resident of that state can go to any other state in the United States, use its highways, cause an accident, and then haul the other parties all the way to New York for trial—all because of the fortuitous

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[3] The majority of the hearing panel below seemingly took the position that all due process objections to the *Seider* attachment were dissipated because (a) the New York Court of Appeals stated that there could not be any *recovery* in New York beyond the face amount of the insured's liability policy (App. 8a), and because (b), despite authority to the contrary, the court below thought it "clear that neither New York nor any other state could constitutionally give collateral estoppel effect to a *Seider* judgment when the whole theory behind this procedure is that it is in effect a direct action against the insurer and that the latter rather than the insured will conduct the defense" (App. 8a, 9a, 12a).

But the court below then stated the obvious answer to the last part of this rather curious contention when it added (App. 10a):

> "To be sure it may be cold comfort to a nonresident defendant to have our assurance that if some state should be so misguided as to consider a New York *Seider* judgment as concluding him, he will be able to have this ruling overturned by the Supreme Court of the United States. But we cannot fairly hold that New York has denied due process merely because of the possibility that some other state may do so."

There would be no comfort at all in the insured's loss of his entire insurance coverage in one New York suit, either by default or the unavailability of out-of-state witnesses. Loss of "only" the face of the policy is loss of everything he has to protect himself in such situations.

fact that the other party's insurer has an office in New York. The non-resident defendant can be forced to trial away from the scene of the accident, without benefit of any fact or medical witnesses who choose not to attend, in a state with which he has at no time had any contact, and which cannot serve him with process. Such a shocking result does not meet even the most basic requirements of fair play and substantial justice.

A majority (Judges Friendly and Feinberg) of the Hearing Panel of the Court of Appeals affirmed the district court, giving the following reasons (App. 1a):

1. This Court's decision in *Watson v. Employers Liability Assurance Corp.*, 348 U. S. 66, indicates that this Court would approve a "direct-action" statute against an insurer doing business in the plaintiff's state, even though the accident happened in another state, the policy was issued in another state, and the defendant was not in the forum state at any relevant time. Thus, considering that this "attachment" procedure is in effect a judicially created direct-action statute (the New York legislature never having enacted one); considering the *insurer* as the real party in interest; and considering the non-resident insured simply as a conduit who has to be named as a defendant so that the plaintiff can get at the insurer, the Court of Appeals upheld the procedure.

2. Noting that the New York courts had held that there be no recovery in New York against the non-resident defendant in excess of the policy limits, the majority of the Court of Appeals held that neither the New York courts nor the courts of another state could give collateral estoppel effect to a *Seider* judgment in excess of those limits. The majority noted that it would be "cold comfort" to such a non-resident defendant to know that if another state undertook to hold him bound by such a judgment "he will be able to have this ruling overturned by the Supreme Court of the United States" (App. 8a).

3. Noting that constitutional problems might also arise concerning counterclaims, the majority held that, since the insured could not assert a counterclaim in a "direct-action" suit, it would not be a denial of due process for New York to allow him to assert one in a *Seider* action only at the risk of personal liability.

4. Since the recovery in New York was to be limited to the policy limits, the majority rejected the insured's position that he has been put to an unconstitutional choice of either due process or loss of his insurance through disclaimer as allowed by the Court of Appeals of New York.

Judge Anderson, in a dissenting opinion (App. 13a) pointed out that, since this Court's *Watson* decision was based principally on the fact that the accident happened in the forum state, that case did not support the majority's decision in this case. He also said that, tested by traditional standards of fair play and substantial justice, permitting this litigation in New York is improper, adding that such a rule would permit a resident of Alaska, injured in Alaska by a New York driver, to be forced to come to New York to defend a suit by the latter. Judge Anderson also noted that due process requires a balancing of interests, not just consideration of the residence and desires of the plaintiff.

Defendants filed Petitions For Rehearing Before The Court En Banc (App. 21a and 33a). In those Petitions, defendants included the following arguments:

(1) The *Watson* case does not validate a legislative much less a judicially created "direct-action" statute applicable to causes of action arising outside the forum against a non-resident defendant having no contacts with the forum state. Indeed, in *Watson*, this Court had indicated exactly the contrary. 348 U. S. 72-73. And no state has ever enacted such a statute.

(2) Even though New York has no direct-action statute, and the insurer was not a party to this litigation, the Court of Appeals decided the case as though the insurer

were the defendant in each case, and without regard to the actual individual defendants' contention that New York lacked personal jurisdiction over them and had no "res" within its borders justifying the so-called quasi-in-rem jurisdiction.

(3) The shocking result outlined in Judge Anderson's dissent should not become the law of the Second Circuit without examination by the entire court.

The Court of Appeals thereupon agreed to reconsider the case on the briefs already filed and supplemental briefs, but without oral argument (App. 40a).

The Court of Appeals *en banc* was also divided. Judge Friendly in an opinion joined by Judges Waterman, Smith, Kaufman, Hays and Fineberg, upheld the prior decision (App. 41a). Judge Anderson again dissented, and was joined by Chief Judge Lumbard and Judge Moore (App. 48a).

The majority this time took note that "defendants complain we did not adequately focus on the burden to a non-resident of having to defend a personal-injury action in another state, conceivably far from his domicile and the place of the accident, simply because his liability insurer has chosen to do business there." The majority's answer was that "We find this argument unpersuasive so long as *Harris v. Balk*, 198 U. S. 215, stands."

Analyzing and comparing *Balk* with the instant case, the majority concluded that the former governs the latter, despite the difference between Balk's admitted and certain $180 debt against Harris and these defendants' inchoate, contingent right to call on their insurers for a defense and possible indemnification. The majority again noted the undesirable consequences and possible constitutional infirmities of *Seider* type litigation, and expressed the hope that the legislature might re-examine the situation (App. 45a).[4]

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[4] Both the majority of the hearing panel below and the majority of the Court *en banc* were apparently torn by serious doubts at

almost every step along their way to affirming the validity of the *Seider* procedure. For example, the majority of the hearing panel said:

> (a) Even if New York could constitutionally provide for a direct action against an insurer doing business in New York, by a New York resident, with respect to an injury suffered elsewhere, *Seider* may still be vulnerable because it involves the nonresident insured as a party defendant (App. 5a).
>
> (b) There is doubt that this Court would sanction a direct action statute where the state was neither the place of injury nor the plaintiff's residence, and equal doubt whether *Seider* could validly be applied in such a case (App. 7a).
>
> Similarly, the majority of the panel felt the need to deny that certain decisions of this Court would prohibit New York from creating a remedy against nonresident defendants in out-of-state accidents solely for New York residents (App. 7a, note 6).
>
> (c) Not without reason, the New York Court of Appeals may have entertained qualms about the constitutionality of New York CPLR §320(c) (circumscribing limited appearances) both in Seider situations and other instances of *quasi in rem* jurisdiction (App. 9a, note 7).
>
> (d) There is authority that a *quasi in rem* judgment may, at least to some extent, work an estoppel on the fact issues which defendant has litigated or had an opportunity to litigate in that action (App. 10a).
>
> (e) There may be other problems of due process because of the possibility of a default judgment if the nonresident chooses not to appear, and the inability of the nonresident to assert a counterclaim without subjecting himself to personal jurisdiction (App. 10a-12a).

Similiarly, the majority of the Court *en banc* noted that in some, but not all cases, the "salutary provisions" of 28 U.S.C. §1404(a) will protect nonresident defendants from undue inconvenience (App. 44a). [The inadequacy of this supposed protection was exposed in Judge Anderson's dissent (App. 51a).]

The majority *en banc* also noted but declined to consider the problems which will arise where there are multiple claims exceeding the available coverage. Curiously enough, the panel's concern was for the *plaintiffs* where "the insured is without funds to pay the excess" (App. 45a); not one word about a resident of any state whose policy could be "attached" in two or more other states, and

In his dissent, Judge Anderson noted that the present validity of *Balk* has been severely challenged; that in any event it involved an "ordinary debt", as contrasted with the contingent, inchoate right to call for defense and indemnification involved here; emphasized that, while the debtor in *Balk* could be in only one jurisdiction at one time, defendants' insurers do business in many states, and could be pursued by different plaintiffs in different states on suits covered by but one policy; and predicted jurisdictional chaos if *Seider* survives. Judge Anderson also disagreed with the majority's view that both the doctrine of "forum non conveniens" and 28 U.S.C. §1404 (a) serve to alleviate *Seider's* constitutional weaknesses.

Since the Court of Appeals treated these two cases together, both originally and on rehearing, the defendants have filed this single petition for certiorari seeking reversal of the judgment below.

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consumed, without his ever having had a hearing before a court with jurisdiction over him or which could compel witnesses to appear.

Finally, the majority did add (App. 45a):

> "We would hope that realization of the complexities of such problems and the considerations urged in our brother Anderson's dissents might stimulate the reexamination of *Seider* intimated in *Simpson v. Loehmann, supra,* 21 N.Y. 2d at 312, 287 N.Y.S. 2d at 638 (opinion of Chief Judge Fuld), 21 N. Y. 2d at 814, 287 N.Y.S. 2d at 640 (concurring opinion of Judge Breitel), before the decision is taken up, perhaps only defensively, by other states."

REASONS FOR GRANTING THE WRIT

1. *The Decision Below Misinterprets and Misapplies Decisions of This Court Concerning an Individual's Right to Due Process of Law Under the Fourteenth Amendment.*

The net effect of the two majority opinions in the Court of Appeals is to reluctantly uphold the *Seider* attachment procedure, professedly in deference to two decisions of this Court. Petitioners submit that the Court of Appeals' majority interpretation and application of each of these decisions of this Court was erroneous and in conflict with the actual holding of this Court:

(a) The majority of the original hearing panel relied almost entirely on *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66. But that decision simply rejected an insurer's challenge to a legislatively-enacted direct-action statute to which it had consented, where the product was sold in the forum state, to a resident of that state, and the injury from it occurred in that state. Here there is no legislatively-enacted direct-action statute; the defendant is not a consenting insurer but a non-resident individual; this non-resident individual has had no contact whatever with the forum state; and the accident did not happen in the forum state. The two situations are totally different and the Court of Appeals converted *Watson* into something this Court never intended it to be.

Indeed, this Court in *Watson* indicated (348 U. S. 72-73) that, even in that case, with a legislatively-enacted direct-action statute on the books, a consenting insurer, and an injury in the forum state, to a resident of that state,

by a product shipped into the state by foreign corporations, the latter could not be subjected to the jurisdiction of the forum state:

> "In this case efforts to serve the Gillette Company were answered by a motion to dismiss on the ground that Gillette had no Louisiana agent on whom process could be served. If this motion is granted, Mrs. Watson, but for the direct action law, could not get her case tried without going to Massachusetts or Illinois although she lives in Louisiana and her claim is for injuries from a product bought and used there."

The Court of Appeals' interpretation and application of *Watson* in this case is directly contrary to this Court's actual holding and reasoning in *Watson* itself. Such a decision should be reviewed by this Court, especially since it involves generally applicable principles of federal constitutional law.

(b) On rehearing *en banc*, the majority of the Court of Appeals did not actually meet or answer the foregoing challenge to the hearing panel's reliance on *Watson*. Instead the majority said (App. 42a) that the individual nonresidents' arguments were "unpersuasive so long as *Harris v. Balk*, 198 U.S. 215 (1905), stands." The complete answer to that position is found in the dissenting opinion of Judge Anderson, joined by Chief Judge Lumbard and Judge Moore (App. 48a). That dissenting opinion points out that, even if *Balk* still has validity in today's drastically changed situation (which seems doubtful), it is not controlling in this case. The debt in *Balk* was an "ordinary debt" for $180, fixed, certain, and not subject to any contingencies; but the "debt" relied upon below is merely an intangible, inchoate right to call on an insurer for a defense and indemnification in a proper forum. Its

total lack of substance for jurisdictional purposes is devastatingly laid out in the dissenting and concurring opinions in the New York Court of Appeals, 17 N.Y. 2d 115, 117 and 21 N.Y. 2d 314-16, 318-320, quoted in footnote 1 to this petition.

Moreover, Judge Anderson pointed out, the fact that, under the ruling below, a nonresident defendant can be sued in any and every jurisdiction where the insurer has an office not only distinguishes *Balk*, (the debtor there could be in only one state at any given time) but provides further proof of constitutional invalidity.

The decision below, based, not on any act of the individual in or involving the forum state (there were none), but on the business practices of his multi-state insurer, is devoid of any rational basis for jurisdiction over the individual. "The unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum state. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that *there be some act* by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U. S. 235, 253 (emphasis added).

This Court should review the lower court's reliance on *Harris v. Balk*, 198 U. S. 215, in the light of the significantly different situation prevailing in this case as well as intervening developments in the law which the majority below ignored.

2. *The Decision Below Represents a Drastic Departure from Both Traditional and Modern Concepts of Jurisdiction Over Individuals Which Has Never Been But Should be Passed Upon By This Court.*

The majority of the Court of Appeals' hearing panel, and the majority of that Court *en banc*, noted that this case

raised serious due process questions.[5] Yet each majority managed to decide the case without mentioning, much less discussing, even in a footnote, any of the landmark due process cases handed down by this Court over the years.[6]

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[5] Those questions, involving the rights of an individual nonresident insured obviously were not actually before this Court in No. 50 October Term 1968. *Hanover Ins. Co. v. Victor*, appeal dismissed, 393 U.S. 7. An insurer doing business in New York would have no standing to invoke the jurisdiction of this Court to consider alleged violations of the constitutional rights of a different party—the nonresident insured. This Court has consistently refused to consider anything other than the rights of specific parties who are actually before the Court in a particular present controversy. See, for example, *Tyler v. Judges of the Court of Registration*, 179 U.S. 405, 406-407; *McCabe v. Atchison, T. & S. F. Ry. Co.*, 235 U.S. 151, 162; *Swift & Co. v. Hocking Valley Ry. Co.*, 243 U.S. 281, 289; *American Power & Light Co. v. Securities and Exchange Commission*, 329 U.S. 90, 107; *United States v. Raines*, 362 U.S. 17, 21; and see text and citations in Robertson & Kirkham (Wolfson and Kurkland Edition, 1951), *Jurisdiction of the Supreme Court of the United States*, §§297, 298.

[6] The legal commentators have been critical of *Seider* both in principle and in practice. As the majority of the hearing panel said (App. 3a):

> "Seider v. Roth received a poor press from the commentators. See, e.g., Reese, The Expanding Scope of Jurisdiction over Non-Residents—New York Goes Wild, 35 Ins. Counsel J. 118 (1968); Comment, Attachment of "Obligations"—A New Chapter in Long-Arm Jurisdiction, 16 Buffalo L. Rev. 769 (1967); Comment, Garnishment of Intangibles: Contingent Obligations and the Interstate Corporation, 67 Colum. L. Rev. 550 (1967); Note, Seider v. Roth: The Constitutional Phase, 43 St. John's L. Rev. 58 (1968); Comment, Quasi in Rem Jurisdiction Based on Insurer's Obligations, 19 Stan. L. Rev. 654 (1967); and a number of comments by Professor David Siegel of St. John's University School of Law, one antedating the Court of Appeals' decision, which have appeared in the annual supplements to CPLR §5201 in McKinney's Consolidated Laws of New York."

See Professor Siegel's seven later articles in the New York Law Journal, issues of March 6 through March 14, 1969.

And see Professor Stein's definitive article "Jurisdiction By Attachment of Liability Insurance," 43 *N.Y.U. L. Rev.* 1075 (1968), especially pages 1105-1108; 1111-1117.

Among the cases conspicuous by their absence are not only the following classics of other days:

Pennoyer v. Neff, 95 U. S. 714,
McDonald v. MaBee, 243 U. S. 90,
Hess v. Pawloski, 274 U. S. 352,
Home Ins. Co. v. Dick, 281 U. S. 397,

but also the more recent important decisions:

Milliken v. Meyer, 311 U. S. 457,
International Shoe Co. v. Washington, 326 U. S. 310,
Travelers Health Assn. v. Virginia, 339 U. S. 643,
McGee v. International Life Ins. Co., 355 U. S. 220,
Hanson v. Denckla, 357 U. S. 235,
Texas v. New Jersey, 379 U. S. 674.

Whether it be the result of, or the reason for, this unusual approach, the decision below is the first known to counsel in which a state has been permitted to assert jurisdiction over a non-resident who was not at any relevant time within that state's borders, and who performed no contract there, mailed no contract there, deposited no money there, did not drive there or fly there, received no money from residents there, bought no insurance there, and had no assets there.

None of the decisions of this Court listed above, nor indeed any other, would authorize such a result. It should not be permitted to become the law of this nation unless and until this Court has reviewed the matter in the light of its own prior decisions which have laid down the basic principles during various periods of our history. If the Fourteenth Amendment really permits every American involved in an accident in his home state with a resident of New York to be forced to go to trial in the courts of New York, a state to which he is a complete stranger, then the people and the other states should be told why, by this Court, so that they can attempt to protect themselves as suggested by Judge Anderson in the Court below (App. 20a).

Conclusion

The judgment of the Court of Appeals for the Second Circuit should be reversed and the complaint in each case dismissed.

Respectfully submitted,

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